INDEX

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authority

JURISDICTIONAL STATEMENT

This is an appeal from an order, entered on January 18, 2001, by the Honorable Stephen H. Goldman, Judge of Division No. 12 of the Circuit Court of St. Louis County, denying the appellant's motion under Rule 24.035 (L.F. 63-68). The appellant's motion sought to vacate his four convictions and concurrent seven-year sentences for stealing (' 570.030, RSMo 1994), which were imposed on November 16, 1999, by Judge Goldman, following the appellant's pleas of guilty (L.F. 33). The appellant's notice of appeal from Judge Goldman's order denying his Rule 24.035 motion was timely filed on February 28, 2001 (L.F. 70-71).

Since "[n]o punishment was imposed" in the appellant's Rule 24.035 case, *see* ***Bryant v. State***, 604 S.W.2d 669, 671-672 (Mo.App. S.D. 1980), and since this appeal did not involve any issues or matters reserved for the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction of this appeal originally was vested in the Eastern District of the Court of Appeals pursuant to Art. V, ' 3 of the Constitution of Missouri, and ' 477.050, RSMo 2000 (which expressly provides that St. Louis County is within the territorial boundaries of the Eastern District of the Court of Appeals).

However, on February 25, 2002, following an opinion issued on January 22, 2002, affirming in part and reversing in part the denial of the appellant's motion under Rule 24.035, the Eastern District of the Court of Appeals, on its own motion, ordered this case transferred to this Court. Therefore, this Court now has

jurisdiction of this appeal pursuant to Art. V, ' 10, of the Constitution of Missouri and Rule 83.02.

STATEMENT OF FACTS

A. Procedural and Factual History

On Saturday, October 17, 1998, at approximately 2 p.m., the appellant, Thomas H. Peiffer, stole a 1999 Saturn automobile from Jim Butler's Saturn of West County, a Saturn dealership located in St. Louis County (L.F. 8-9). Two days later, on Monday, October 19, 1998, the appellant was observed still in possession of the stolen vehicle in the City of St. Louis (L.F. 52).

On December 15, 1998, an information was filed in the Circuit Court of the City of St. Louis, charging the appellant with four felonies and two misdemeanors, including tampering in the first degree, a class C felony ' 569.080.1(2), RSMo 1994, based upon the appellant's unlawful possession of the stolen Saturn (L.F. 51-53). Count IV of the information charged that the appellant, on October 19, 1998, "knowingly and without the consent of the owner unlawfully possessed an automobile, to-wit: a 1999 Saturn" (L.F. 52).

On March 23, 1999, the appellant appeared with his attorney in the Circuit Court of the City of St. Louis, Division No. 12, and entered pleas of guilty to the four felony and two misdemeanor counts, including the charge of first-degree tampering (L.F. 58-62). Sentencing was, however, deferred until March 31, 2000 (L.F. 58).

On July 12, 1999, the appellant was charged by an information filed in the Circuit Court of St. Louis County, in case No. 98CR-5413, with felony stealing in violation of ' 570.030.1, 3(a), RSMo 1994 (L.F. 54). The information alleged that on October 17, 1998, the appellant unlawfully "appropriated a 1999 Saturn automobile, . . . in the possession of Jim Butler's Saturn of West County" (L.F. 54).

The appellant subsequently was charged in St. Louis County with three additional counts of felony stealing: one count of stealing, third offense, in case No. 99CR-4750, and two counts of stealing, third offense, in case No. 99CR-4751 (L.F. 8-9).

B. Guilty Plea Proceedings

On November 16, 1999, the appellant appeared with his attorney, Mr. Andrew Sottile, before the Honorable Steven H. Goldman, Judge of Division No. 12 of the Circuit Court of St. Louis County, and entered pleas of guilty to all four felony stealing charges (L.F. 3-4). The pleas were entered as part of a plea agreement in which the State, in exchange for the appellant's pleas of guilty to all four charges, agreed to concurrent sentences of seven years imprisonment on each of the four counts (L.F. 4).

During the plea proceedings, the appellant acknowledged that he understood the range of punishment for the four charges and was aware that, in exchange for his guilty pleas, the State would recommend an aggregate sentence of seven years imprisonment on the four counts (L.F. 7, 9). The appellant told the court that, with the exception of the plea agreement, no one had made any promises to him about what he'd "receive or anything else about . . . any of these cases" (L.F. 9-10).

The appellant said that he understood that by pleading guilty he would be waiving his right to a jury trial (L.F. 9-10, 12-13). The appellant stated that his plea counsel, Mr. Sottile, had spent sufficient time investigating and explaining the case, and that he was satisfied with his attorney's services (L.F. 11-12).

The appellant admitted that on October 17, 1998, he had Aappropriated a 1999 Saturn automobile in the possession of Jim Butler=s Saturn of West County without the consent of that dealership and with the purpose to permanently deprive

the victim of the property@ (L.F. 7-8). He also told the court that he faced a pending charge in the City of St. Louis for tampering with that 1999 Saturn (L.F. 10). However, the appellant said he understood that Judge Goldman did not Ahave any control over what they do in the City@ (L.F. 10).

At the conclusion of the plea proceedings, Judge Goldman accepted the appellant=s guilty pleas to the four offenses and sentenced him, in accordance with the terms of the plea agreement, to four concurrent seven-year terms of imprisonment on each of the four felony stealing charges (L.F. 13-14).

The appellant subsequently was returned to the Circuit Court of the City of St. Louis, where, on March 31, 2000, he was sentenced to concurrent terms of 173 days in the county jail on all six counts, including the tampering charge (L.F. 58-62).

C. Rule 24.035 Proceedings

In the interim between the imposition of the appellant's sentences in St. Louis County and the subsequent imposition of his sentences in the City of St. Louis, the appellant, on February 14, 2000, filed a *pro se* motion under Rule 24.035 in the Circuit Court of St. Louis County, seeking to vacate his four felony stealing convictions and sentences (L.F. 19-29). On December 22, 2000, an amended motion was filed on the appellant's behalf by Douglas R. Hoff, an assistant public defender (L.F. 33-50).

The amended motion raised three grounds for relief: (1) that since the appellant "had already been charged in the City of St. Louis with a tampering charge, his right to be free from double jeopardy prohibited him from being charged in St. Louis County with stealing the same automobile" (L.F. 36); (2) that the appellant's plea attorney was ineffective in failing to move to dismiss the St. Louis County stealing charge on grounds of double jeopardy (L.F. 39-44); and (3)

that his trial attorney "was ineffective for telling [the] appellant that receiving concurrent time in two later cases [*i.e.*, the 1999 stealing cases] would not affect his conditional release date from the Missouri Department of Corrections in his first case," *i.e.*, the 1998 stealing charge (L.F. 45).

On January 18, 2001, the appellant's motion was denied by Judge Goldman without an evidentiary hearing (L.F. 63-68).[1] In his findings of fact and conclusions of law, Judge Goldman found that the appellant's prior guilty plea to the tampering charge in the City of St. Louis did not preclude his subsequent conviction and sentence for stealing an automobile in St. Louis County, because tampering in the first degree was not a lesser-included offense of stealing, and because, in any event, he had not yet been sentenced on the tampering charge at the time he was sentenced in St. Louis County for stealing (L.F. 63-64).

With respect to the appellant's third claim, Judge Goldman interpreted it as an allegation that plea counsel caused him to believe that all of the jail-time credit he had accumulated on his 1998 stealing case would be applied to his other, subsequent St. Louis County sentences (L.F. 67). Judge Goldman found that such a belief was inherently "unreasonable," and that the appellant "could not reasonably believe that he would receive credit in two cases for time served on an earlier case" (L.F. 67). The court also noted that, at the time the appellant's pleas

[1]A copy of Judge Goldman's findings of fact and conclusions of law has been attached to this brief as the respondent's "Appendix A."

were entered, he "denied that any promises [had been] made to him by his attorney" (L.F. 68).

On February 28, 2001, the appellant filed his notice of appeal from this judgment (L.F. 70-71). On January 22, 2002, a three-judge panel of the Missouri Court of Appeals, Eastern District, issued an opinion, affirming in part and reversing in part the denial of the appellant's motion under Rule 24.035. ***Peiffer v. State***, No. ED 79192 (Mo.App. E.D. Jan. 22, 2002).[2]

However, on February 25, 2002, the Court of Appeals, on its own motion and following an alternative motion for rehearing or transfer filed by the State, ordered this case transferred to this Court pursuant to Rule 83.02.

[2]A copy of that opinion has been attached to this brief as the respondent's "Appendix B."

ARGUMENT

I.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN SUMMARILY DENYING THE APPELLANT=S CLAIM THAT, UNDER THE DOUBLE JEOPARDY CLAUSE, HIS PLEA OF GUILTY TO A CHARGE OF FIRST-DEGREE TAMPERING INVOLVING A STOLEN AUTOMOBILE PREVENTED HIM FROM LATER BEING CONVICTED OF STEALING THE SAME VEHICLE IN ST. LOUIS COUNTY, BECAUSE (1) TAMPERING IN THE FIRST DEGREE IS NOT A LESSER-INCLUDED OFFENSE OF STEALING; (2) THE APPELLANT'S TAMPERING CONVICTION WAS NOT BASED UPON THE "SAME CONDUCT" AS THE STEALING CHARGE, WHICH INVOLVED CONDUCT THAT HAD OCCURRED TWO DAYS EARLIER; (3) SINCE THE APPELLANT HAD NOT BEEN SENTENCED IN THE TAMPERING CASE, HIS SENTENCE FOR THE ST. LOUIS COUNTY STEALING CHARGE COULD NOT HAVE SUBJECTED HIM TO "DOUBLE JEOPARDY" EVEN IF IT CONSTITUTED THE "SAME OFFENSE" AS THE TAMPERING CASE; AND (4) THE APPELLANT WAIVED ANY POTENTIAL DOUBLE-JEOPARDY DEFENSE BY PLEADING GUILTY TO THE STEALING CHARGE *AND* ACCEPTING THE BENEFITS OF THE PLEA BARGAIN.

Under Point I of the substitute brief he filed in the Court of Appeals, the appellant asserts that he was entitled to an evidentiary hearing in connection with his Rule 24.035 motion because he alleged that the state and federal constitutional protection "against double jeopardy prohibited him from being charged and convicted of stealing a motor vehicle in St. Louis County and tampering in the first degree in the City of St. Louis," where, as here, the same vehicle was involved. The appellant argues in his substitute brief that "[t]he two offenses were the same

offense for double jeopardy purposes and [that he] could not be prosecuted for both of them" (App.Br. 12).[3]

In an opinion issued on January 22, 2002, a three-judge panel of the Eastern District of the Court of Appeals found that the appellant's claim had merit. Before transferring the case to this Court, the court issued an opinion that purported to overrule its prior opinion in ***State v. McIntyre***, 749 S.W.2d 420 (Mo.App. E.D. 1988), and held that the Double Jeopardy Clause barred the appellant's prosecution for stealing an automobile in St. Louis County because he already had pleaded guilty to, and was awaiting sentence on, a charge of first-degree tampering involving the same vehicle in the City of St. Louis.

The Court of Appeals held, contrary to ***State v. Morton***, 971 S.W.2d 335, 340[6] (Mo.App. E.D. 1998), that jeopardy "attached" on the tampering case when the appellant's guilty plea to that charge was accepted, that the subsequent prosecution for what the Court of Appeals

[3]The designation "App.Br." refers to the substitute brief that the appellant filed in the Court of Appeals. The appellant did not file a substitute brief in this Court.

believed was the "same offense" constituted double jeopardy, and that the defense of double jeopardy was not waived by the appellant's plea of guilty to the stealing charge pursuant to a plea agreement.

Fortunately, the Court of Appeals' decision to transfer this case to this Court under Rule 83.02 affords the respondent an opportunity to conclusively demonstrate that all three aspect of its decision were manifestly incorrect.

First of all, the appellant incorrectly argues, and the Court of Appeals mistakenly found, that the offense of tampering in the first degree, as proscribed by ' 569.080.1(2), RSMo 2000, is a lesser-included offense of stealing, as defined by ' 570.030.1, RSMo 2000. ***McIntyre*** clearly and unequivocally holds that it is not, and numerous cases have held that a charge of tampering, regardless of its degree, is not a lesser-included offense of stealing.

Second, the Court's opinion failed to acknowledge that, even if first-degree tampering could be considered a lesser-included offense of stealing, even where a motor vehicle is involved, the two charges were not based upon the "same conduct," but rather upon separate acts that occurred two days apart in different jurisdictions.

Third, the Court of Appeals' opinion also failed to realize that, even if it could be said that ***McIntyre*** was

incorrectly decided in 1988 when the Court of Appeals concluded that Missouri law permits a defendant to be guilty of stealing an automobile and tampering with the same vehicle if the two incidents are separated in time, the Missouri legislature has subsequently adopted ***McIntyre***'s construction of the state's stealing and tampering statutes when, on three separate occasions, it re-enacted the stealing statute without modifying its provisions to preclude multiple convictions for stealing and tampering with the same vehicle.

Fourth, in holding that jeopardy attaches when a defendant's guilty plea is "unconditionally accepted," the opinion is contrary to ***Morton***, which expressly holds that, "in a guilty plea proceeding, jeopardy does not attach until the defendant is sentenced." ***Morton***, 971 S.W.2d at 340[6].

Fifth, even if the law were otherwise, and jeopardy "attached" when the appellant's guilty plea was accepted in the City of St. Louis, the Court of Appeals' opinion overlooked the fact that the dispositive question is not when jeopardy "attached" on that charge, but rather whether, at the time the appellant pleaded guilty to the stealing charge in St. Louis County, he had been *convicted* of the same offense in the City of St. Louis. The protection of the Double Jeopardy Clause implicated by the appellant's argument involves its protection against the

"prosecution of a defendant for a greater offense when he has already been tried and . . . *convicted* on the lesser included offense." ***Ohio v. Johnson***, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) (emphasis added). Even if first-degree tampering were to be considered a lesser-included offense of stealing an automobile, the appellant certainly was not "convicted" of it, since a plea of guilty, unaccompanied by an executed sentence, is not a "conviction."

Finally, the Court of Appeals' opinion was in error when it found that the appellant did not waive any double-jeopardy claim he might otherwise have had by entering an unconditional plea of guilty to the stealing charge and accepting the benefits of the plea bargain. The effect of the Court of Appeals' ruling would be to enable the appellant to escape the entire consequences of his plea bargain in St. Louis County (four separate felony convictions) while allowing him to retain its full benefits (concurrent rather than consecutive seven-year sentences).

A. The Facts

On October 17, 1998, the appellant stole a 1999 Saturn automobile from a new car dealership in St. Louis County; two days later he was caught in possession of the same automobile in the City of St. Louis (L.F. 8-9, 52). His actions gave rise to two separate prosecutions: a charge of first-degree tampering in the City of St. Louis, and the subsequent, related-but-separate charge of stealing an automobile in St. Louis County (L.F. 51-53, 54).

He pleaded guilty to the tampering charge in the Circuit Court of the City of St. Louis on March 23, 1999 (L.F. 58-62). While he was awaiting sentencing on this charge, he pleaded guilty, as part of a plea agreement, to the St. Louis County stealing charge (L.F. 3-4). In accordance with terms of a plea agreement, he received a concurrent seven-year sentence to be served concurrently with three other seven-year sentences for felony stealing (L.F. 13-14). The appellant was not sentenced on the tampering charge in the City of St. Louis until March 31, 2000, at which time he received a term of 173 days imprisonment (L.F. 58-62).

Although the appellant was sentenced last on the tampering charge, he elected to attack his stealing sentence in a Rule 24.035 action, asserting that principles of double jeopardy barred his prosecution in St. Louis County on the stealing charge because he had "already been

charged in the City of St. Louis with a tampering charge" (L.F. 35).

But despite the fact that the appellant obviously had not been *convicted* of tampering in the City of St. Louis at the time he was convicted and sentenced in St. Louis County for stealing, the Court of Appeals held, in its opinion of January 22, 2002, that the mere fact that the appellant had pleaded guilty to the tampering charge barred his subsequent prosecution on the stealing charge, because (1) first-degree tampering was a "lesser-included" offense of stealing; (2) jeopardy "attached" when the appellant's guilty plea on the tampering charge was "unconditionally accepted"; and (3) the appellant's guilty plea to the tampering charge did not waive his protection against double jeopardy.

B. First-Degree Tampering Not Lesser-Included Offense of Stealing

As the Court of Appeals readily acknowledged in its opinion, in 1988, it held, on identical facts in ***McIntyre***, that multiple convictions for both stealing and first-degree tampering did *not* subject a defendant to double jeopardy. The Court of Appeals held that (1) first-degree tampering is *not* a lesser-included offense of felony stealing, and (2) the two convictions were not, in any way, based upon the "same conduct," since "the tampering was not

a part of the stealing that occurred two days earlier." ***McIntyre***, 749 S.W.2d at 422[1].

The Court of Appeals' opinion in this case addressed the first half of the holding in ***McIntyre***, but not the second. It rejected, as a federal court later did in ***McIntyre v. Caspari***, 35 F.3d 338 (8th Cir. 1994), *cert. denied*, 514 U.S. 1077, 115 S.Ct. 1724, 131 L.Ed.2d 582 (1995), its earlier conclusion in ***McIntyre*** that first-degree tampering is not a lesser-included offense of stealing, even in cases where the property stolen consists of a motor vehicle. It correctly noted that the cases it previously relied on in ***McIntyre*** for that proposition were cases construing the statute defining tampering in the *second* degree, and found that they are inapplicable to cases involving first-degree tampering.[4]

Unquestionably, even prior to ***McIntyre***, there were numerous cases which held that tampering in the second degree was not a lesser-included offense of stealing an automobile. ***State v. Winkelmann***, 761 S.W.2d 702, 708[4] (Mo.App. E.D. 1988); ***State v. Souders***, 703 S.W.2d 909,

[4]However, in an earlier decision in the *same case*, the Eighth Circuit found that first-degree tampering was *not* a lesser-included offense of stealing an automobile. ***McIntyre v. Trickey***, 975 F.2d 437, 442 n. 3 (8th Cir. 1992), *vacated*, 510 U.S. 939, 114 S.Ct. 375, 126 L.Ed.2d 325 (1993).

911[9] (Mo.App. E.D. 1985); ***State v. Ferguson***, 678 S.W.2d 873, 878[14-15] (Mo.App. E.D. 1984); ***State v. Gobble***, 675 S.W.2d 944, 949[9] (Mo.App. E.D. 1984); ***State v. Rivers***, 663 S.W.2d 255, 256 (Mo.App. E.D. 1983); ***State v. Smith***, 655 S.W.2d 626, 628 (Mo.App. W.D. 1983); ***State v. St. Clair***, 643 S.W.2d 605, 610[4] (Mo.App. W.D. 1982).

However, if nothing else, common sense dictates that if second-degree tampering is not a lesser-included offense of stealing an automobile, first-degree tampering cannot be either, because, by statute (' 556.046.1(2), RSMo 2000), second-degree tampering is a lesser-included offense of first-degree tampering because it "is specifically denominated by statute as a lesser degree of the offense charged." It would be completely anomalous and nonsensical to hold, as the Court of Appeals did in its opinion, that first-degree tampering is a lesser-included offense of stealing, but that its only lesser-included offense, second-degree tampering, is not. How is that conceivably possible?

Moreover, even a cursory comparison of the statutes defining stealing and tampering readily reveal that the two statutes do not, as ***McIntyre*** clearly holds, stand in relation to each other as greater- and lesser-included offenses. Missouri follows the "statutory elements" test in determining if an offense is truly a lesser-included offense. ***State v. Smith***, 592 S.W.2d 165, 166 (Mo. banc

1979); ***Gobble***, 675 S.W.2d at 948[7]. This approach compares the *statute* defining the greater offense with the factual and legal elements of the lesser offense, rather than comparing the *charge* of the greater offense with the legal and factual elements of the lesser crime. ***Smith***, *id.*

Under the "statutory elements" test of ' 556.046.1(1), identification of the lesser-included offenses requires that the greater of the two offenses encompass all of the legal and factual elements of the lesser crime. ***State v. Bowles***, 754 S.W.2d 902, 910[6] (Mo.App. E.D. 1988). Under this test, an offense is not truly "lesser-included" unless it is impossible to commit the greater without also committing the lesser offense. ***State v. Harris***, 620 S.W.2d 349, 355[10] (Mo. banc 1981); ***State v. Barnard***, 972 S.W.2d 462, 465-466[7] (Mo.App. W.D. 1998); ***State v. Mizanskey***, 901 S.W.2d 95, 98[4] (Mo.App. W.D. 1995); ***Bowles***, 754 S.W.2d at 910[6].

Obviously, it is possible to commit the crime of stealing without tampering with a motor vehicle. Stealing is defined as the act of "appropriat[ing] property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." ' 570.030.1. A person who steals property, services or anything other than a motor vehicle certainly would not be guilty of tampering.

Although stealing a motor vehicle is elevated from a misdemeanor to a felony because of the nature of the property stolen, just as is stealing property or services of $750 or more, the theft of a motor vehicle is not an

essential element of stealing, but rather merely one method by which the crime of stealing is elevated from a misdemeanor to a felony. ***State v. Brown***, 950 S.W.2d 930, 931-932[3-4] (Mo.App. E.D. 1997).

In ***Brown***, the defendant argued that stealing was not a lesser-included offense of first-degree robbery where the property stolen was a motor vehicle. The defendant noted that, to establish the crime of robbery, the State was merely required to prove that the property forcibly stolen had some value. He asserted that the offense of "stealing a motor vehicle" contained an additional, essential element not found in the robbery statute, *i.e.*, proof that the property stolen was a motor vehicle.

The Court of Appeals in ***Brown*** disagreed. It concluded that the offense of stealing, like robbery, merely requires that the property has some value, and that proof that the property taken was a motor vehicle merely was an evidentiary fact necessary to elevate the crime of stealing from a misdemeanor to a felony. Accordingly, an information or indictment that alleged that the defendant forcibly stole property was sufficient to support a conviction of the lesser-included offense of stealing, even where an automobile was the property proved to have been stolen. ***Brown***, 950 S.W.2d at 932. *See also* ***State v. Thornhill***, 770 S.W.2d 701, 702 (Mo.App. E.D. 1989) ("The amount of money stolen was not a necessary element to the offense [of stealing], but provided for increased punishment.")

In other words, the essential elements of stealing are the wrongful appropriation of property or services with the intent to deprive the owner of them. The type or nature of the property stolen in a particular case is an evidentiary fact that the State must allege and prove in cases where it is

asserted in the indictment or information that the crime was a felony, but it is *not* an element of the offense. If that were not the case, then ***Brown*** would have to have been decided differently because the robbery charge did not include the allegation that the defendant forcibly stole a motor vehicle.

But even assuming that, contrary to the analysis required by ***Smith***, felony stealing, *as charged in this case*, necessarily included the element of stealing a motor vehicle, it is still possible to steal a motor vehicle without tampering with it. Tampering in the first degree, as proscribed by ' 569.080.1(2), occurs when a person knowingly "receives, possesses, sells, alters, defaces, destroys or unlawfully operates an automobile." Unquestionably, a person could "appropriate," *i.e.*, "take, obtain, use, transfer, conceal or retain possession of" (' 570.010(2), RSMo 2000) an automobile, and therefore commit the crime of stealing, without committing first-degree tampering by receiving, possessing or operating it. A person who was not in possession of a vehicle could, as the motion court correctly noted, transfer possession of that vehicle merely by giving the keys and a false title of a car to an innocent donee (L.F. 63). The defendant would have "stolen" the automobile, but would not be guilty of tampering.

Or, a person could "conceal" from its true owner, and therefore "appropriate," an automobile, merely by camouflaging it with a tarp or some other covering; such an action would amount to the crime of stealing if the person's intent was to permanently deprive the owner of possession of the vehicle, but it would not constitute tampering, since the vehicle would not be received, possessed, altered, defaced, destroyed or unlawfully operated. Obviously, it is not difficult to come up with other, similar examples where

a defendant could steal an automobile, yet not actually tamper with it. Any one of those examples demonstrate that, since a defendant can commit the crime of stealing of motor vehicle without tampering with it, the two offenses do not stand in relation to each other as greater and lesser offenses.

C. The Convictions Were Not Based Upon the "Same Conduct"

However, even assuming, solely for the sake of argument, that first-degree tampering, under the "statutory elements" test of ***Smith*** and ' 556.046.1(1), must be considered a lesser-include offense of the crime of stealing an automobile, it does not follow that multiple convictions for both offenses would be precluded, since the appellant's convictions, like the defendant's convictions in ***McIntyre***, were not based upon the "same conduct."

Although, pursuant to ' 556.041(1), RSMo 2000, a person may not be prosecuted for the "same conduct" if "[o]ne offense is included in the other, as defined in section 556.046," the threshold question, of course, is whether the multiple charges are, in fact, based upon the "same conduct" or whether--as in the present case--they are based upon related, but *separate* conduct.

For example, suppose a defendant commits the offense of assault in the first degree (' 565.050.1, RSMo 2000) in St. Louis County by attempting to cause serious physical injury to a specific person. Then, two days later, the defendant assaults the same victim in the City of St. Louis, attempting to cause only physical injury this time,

conduct which amounts to just second-degree assault. *See* ' 565.060.1(2), RSMo 2000.

Under the Court of Appeals' reasoning, a guilty plea to the second-degree assault charge in the City of St. Louis would preclude the defendant's prosecution for first-degree assault in St. Louis County, because second-degree assault is clearly a lesser-included offense of first-degree assault. However, since the two charges were not based upon the "same conduct," ' 556.046.1(1) would have no application and would not bar the successive prosecutions.

Another example would be the situation where a defendant fires successive shots, just seconds apart, into a dwelling house in violation of ' 571.030.1(3), RSMo 2000, the statute defining the unlawful use of a weapon. If the State elects to charge the defendant with one felony for each shot fired, it could be (and has been) argued that the multiple charges constitute double jeopardy, since each charge would necessarily entail the *same* elements. But, again, ' 556.046.1(1) has no application because the multiple charges are based upon separate conduct, not the "same conduct," even though both shots were fired one after another. *See* ***State v. Morrow***, 888 S.W.2d 387 (Mo.App. S.D. 1994).

The same is true in the present case. Even if tampering with an automobile was a lesser-included offense of stealing that automobile, stealing the car in St. Louis County on October 17, 1998, was not the "same conduct" as possessing, operating or otherwise tampering with the same vehicle two days later in the City of St. Louis. ***McIntyre***, 749 S.W.2d at 422[1]. In ***McIntyre***, the Court of Appeals expressly held that "the tampering was not a part of the stealing that occurred two days earlier," although it cautioned that if the "defendant had been charged with stealing and tampering based solely on his driving the [vehicle] from the dealership parking lot, . . . his conduct would constitute only one offense." ***McIntyre***, 749 S.W.2d at 422[1].

Here, as in ***McIntyre***, the appellant was still in possession of the stolen vehicle two days later in another part of the state. It is apparent that the appellant, at some point after the theft, stopped and got out of the vehicle, effectively completing the crime of stealing. When he continued to operate or possess the car two days later, he committed a second offense.

Such a conclusion is supported by the holding in ***State v. Davis***, 849 S.W.2d 34 (Mo.App. W.D. 1993), where the Court of Appeals upheld the defendant's convictions of, among other offenses, both robbery in the first degree and first-degree tampering based upon evidence which showed

that he forcibly stole the victim's vehicle and then drove away in it.

Although, in view of the holding in ***McIntyre***, the Court of Appeals in ***Davis*** could have resolved the issue simply by noting that tampering in the first degree is not a lesser-included offense of robbery in the first degree, it did not do so. Instead, it emphasized that the two convictions were not based upon the "same conduct": The taking of the automobile occurred, the court said, when the victim "yielded the possession of the vehicle to Davis under the threat of physical force." ***Davis***, 849 S.W.2d at 43. The offense of first-degree tampering, on the other hand, occurred "when Davis began to operate the automobile without the consent of the owner." ***Davis***, *id.*

The same is true in the present case. The crime of stealing occurred when the appellant drove the 1999 Saturn off the car dealer's lot on the afternoon of October 17, 1998. Even if the appellant had immediately transferred the vehicle to someone else or concealed or destroyed it, the crime was already complete. When he continued to possess the stolen vehicle two days later in the City of St. Louis, he knowingly and consciously committed another crime, the offense of tampering. *See e.g.*, ***Wright v. State***, 764 S.W.2d 96, 97 (Mo.App. W.D. 1988) (convictions of stealing a controlled substance and possession of the same substance *one day after the theft* do not constitute

double jeopardy, even if defendant had continued possession of the drugs from the time of the theft); ***State v. Brown***, 750 S.W.2d 139, 142[4] (Mo.App. E.D. 1988) (convictions of both manufacture of marijuana and continued possession of marijuana that defendant manufactured did not constitute double jeopardy).

It should be noted that the statute defining tampering with a motor vehicle also proscribes such acts as selling, defacing or destroying a motor vehicle. ' 569.080.1(2). Certainly, if the appellant had stolen the Saturn on one day, and destroyed, defaced or sold it two days, or even *two minutes* later, no one would seriously question that he could be prosecuted for both stealing and tampering. Why, then, should the result differ from case to case depending upon the *means* that the tampering is committed?

Up until now, anyway, the law in Missouri has been clear: If you steal a motor vehicle in one jurisdiction and are apprehended in another jurisdiction several days later in possession of, or operating that stolen vehicle, you have committed *two* offenses, not one. The fact that you stole the vehicle does not give you rights equal to, or greater than, that of the legitimate owner; you do not have *carte blanche* to continue to keep, operate, deface, destroy or sell the stolen vehicle without fear of further punishment.

Again, this is just simple common sense. As recently emphasized by the Court of Appeals in ***State v. Barber***, 37 S.W.2d 400, 405 (Mo.App. E.D. 2001), criminal statutes should and must be interpreted in a manner that is calculated to encourage defendants to minimize, rather than maximize, the nature and extent of their criminal conduct. An interpretation of the stealing and tampering statutes that levies no additional penalty on a defendant for the continued possession, use, destruction or transfer of a stolen vehicle fails to accomplish that objective and clearly "would violate public policy." ***Barber***, *id.*

D. Effect of Amendments to Stealing Statute

However, public policy arguments aside, there still is another reason why the Court of Appeals should not have attempted to overrule ***McIntyre***: Regardless of whether it was correctly decided in February of 1988, when the opinion was issued, the Court of Appeals' interpretation of these aspects of the stealing and tampering statutes has now been adopted by the legislature.

As previously emphasized, since ***McIntyre*** was decided almost 14 years ago, it has been the settled law in Missouri that a defendant can be convicted of both stealing and tampering with the same automobile, provided "that the appropriation and operation of" the vehicle were not "`so closely connected in time' that they would constitute only one offense." ***McIntyre***, 749 S.W.2d at 411[1]. The ***Davis***

case, decided in 1993, even held that a defendant who *forcibly* steals a vehicle can be convicted of both robbery *and* first-degree tampering if he proceeds to drive off in the vehicle he has just stolen.

The Court of Appeals in this case completely overlooked ***Davis***, and, apparently influenced by the federal court's contrary holding in ***McIntyre v. Caspari***, *id.*, concluded that its decision in ***McIntyre*** was wrongly decided. But even if that were true, the Missouri legislature has on three occasions--1996, 1997 and 1998--amended and re-enacted the stealing statute (now ' 570.030, RSMo 2000), without including any revisions or modifications that would have overruled the Court of Appeals' holding in ***McIntyre***.

An appellate court will presume that the legislature, in re-enacting a statute in substantially the same terms, has approved and adopted the previous construction given to the statute by a court of last resort, unless a contrary intent clearly appears from the statute. ***Investors Title Co. v. Chicago Title Ins. Co.***, 18 S.W.3d 70, 73[3] (Mo.App. E.D. 2000); ***U.S. Cent. Underwriters Agency, Inc. v. Manchester Life & Cas. Management Corp.***, 952 S.W.2d 719, 722[1] (Mo.App. E.D. 1997). The Court of Appeals is a "court of last resort." ***State ex. rel. Appel v. Hughes***, 351 Mo. 488, 173 S.W.2d 45, 50 (Mo.

1943); ***State ex. rel. Miles v. Ellison***, 269 Mo. 151, 190 S.W. 274 (banc 1916).

In amending ' 570.030, the legislature could have included a provision that precluded convictions of both stealing a motor vehicle and first-degree tampering involving the same vehicle. *See*, *e.g.*, ' 571.015.4, RSMo 2000 (providing that the provisions of the armed criminal action statute "shall not apply" to various felonies); ' 571.030.2, 3 (providing that the provisions of the unlawful use of weapons statute "shall not apply" or "do not apply" in certain situations). But it did not do so.

Consequently, even assuming that the Court of Appeals was in error when it held in 1988 that convictions of both stealing and tampering with the same vehicle did not constitute double jeopardy if the "tampering was not part of the stealing," the legislature's subsequent adoption of that construction of ' 570.030 is now binding on the appellate courts of this state and on the federal courts, as well.

In cases involving the Double Jeopardy Clause's prohibition against multiple punishments for the "same offense," double-jeopardy analysis is limited to the question of whether cumulative punishments were intended by the legislature. ***Missouri v. Hunter***, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); ***State v. McTush***, 827 S.W.2d 184, 186[2] (Mo. banc 1992). Although the ***Hunter***

decision was limited to instances where the prosecution seeks multiple convictions in the same proceeding, it is now clear that the test is the same whether the State seeks multiple punishments in the same proceeding or in successive proceedings. ***United States v. Dixon***, 509 U.S. 688, 704, 113 S.Ct. 2849, 2860[12], 125 L.Ed.2d 556 (1993). Thus, subsequent to ***Dixon***, "if two offenses are not the same for the purposes of barring multiple punishment, they necessarily will not be the same for purposes of barring successive prosecutions." ***United States v. Bennett***, 44 F.3d 1364, 1372[9] (8th Cir. 1995).

In its opinion, the Court of Appeals completely overlooked the fact that, whether it was right or wrong when it was decided, its opinion in ***McIntyre***, allowing multiple convictions and punishments for both stealing and tampering with the same automobile, had subsequently received the stamp of approval from the Missouri Legislature when it re-enacted ' 570.030 without including a provision that would have overruled ***McIntyre***. That means that the Court of Appeals' ill-advised attempt to "overrule" ***McIntyre*** came at least eight years too late. Once the legislature amended the stealing statute in 1996, the ***McIntyre*** ruling was engrafted onto the statute and remains so to this date.

As earlier noted, under ***Hunter*** and ***Dixon***, the question of whether the Double Jeopardy Clause prevents a

defendant in the appellant's situation could be convicted of both stealing and first-degree tampering is strictly a question of legislative intent. ***McIntyre*** clearly holds that the legislature *did* sanction such a result, at least where the stealing and tampering charges are not based upon the defendant's initial act of driving off in the stolen vehicle. ***Davis*** goes even further, and allows for convictions of both forcible stealing (robbery) and tampering, even where the tampering charge is based on the defendant's act of driving away in the car he just stole.

The existence of the ***McIntyre*** decision, and the Missouri Legislature's subsequent ratification of that ruling before the appellant's crimes occurred, also prevent him from asserting that he could not have anticipated that the stealing and tampering statutes would be interpreted in such a manner. *See* ***Brown v. Ohio***, 432 U.S. 162, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

In ***Brown***, a sharply divided U.S. Supreme Court invalidated, on double-jeopardy grounds, a defendant's convictions for both auto theft and joyriding, where Ohio courts had consistently held that the crime of joyriding was a lesser-included offense of auto theft, and where the statute had never previously been interpreted to allow convictions of both auto theft and joyriding based on the same course of conduct.

In the present case, by contrast, Missouri courts have consistently held that tampering, whether first- or second-degree tampering, is *not* a lesser-included offense of stealing, even where an automobile is the property stolen. More to the point, since ***McIntyre*** was decided, a defendant in the appellant's situation has been on notice that Missouri's stealing and tampering statutes allow a defendant in Missouri to be convicted of both stealing and tampering with the same vehicle, at least where the charges are not based upon the defendant's act of initially driving away with the stolen vehicle. *See* ***Brown***, 432 U.S. at 169 n. 8, 97 S.Ct. at 2227 n. 8 (recognizing that it would be "a different case" if Ohio's joyriding statute had been judicially construed to allow convictions for both auto theft and joyriding).

E. Significance of When Jeopardy "Attaches"

Of course, even if the appellant's convictions of both stealing and first-degree tampering actually constituted "double jeopardy," that still does not answer the question of whether the motion court was "clearly erroneous" in refusing to vacate the appellant's guilty plea to the stealing charge. Additional questions still need to be answered, including the issue of whether the appellant's prosecution on the stealing offense in St. Louis County was barred on double-jeopardy grounds by the mere *filing* of the tampering charge (as the appellant alleged in his Rule 24.035 motion) or by the "unconditional acceptance of his guilty plea" in the City of St. Louis, as the Court of Appeals held in its opinion.

In its opinion, the Court of Appeals concluded that jeopardy "attached" on the tampering charge in the City of St. Louis once the judge in that circuit unconditionally accepted his guilty plea. The Court of Appeals cited two Missouri appellate cases, ***Jones v. State***, 771 S.W.2d 349, 351 (Mo.App. E.D. 1989), and ***State v. Bally***, 869 S.W.2d 777 (Mo.App. W.D. 1999), in which the courts left the question unanswered. In ***Jones***, the Court of Appeals "assumed" that jeopardy attached upon sentencing, and in ***Bally***, the Western District stated that it did "not need to decide, however, whether the *Jones* court was correct in its

assumption that jeopardy attaches to a plea upon sentencing of a defendant." ***Bally***, 869 S.W.2d at 779.

However, two sentences later in its opinion, the Court of Appeals stated that it "concurred with the Western District's assertion that double jeopardy generally attaches to a guilty plea upon its unconditional acceptance." In the next paragraph, the Court of Appeals decided that "[b]ased on federal and other precedent, we find that jeopardy attaches to a guilty plea when it is unconditionally accepted."

This conclusion flies in the face of ***Morton***, the only Missouri case actually in point: In ***Morton***, the Court of Appeals unequivocally held that "*in a guilty plea proceeding, jeopardy does not attach until the defendant is sentenced*," and went on to state that, "*[s]ince defendant was not sentenced, jeopardy never attached.*" (Emphasis added). ***Morton***, 971 S.W.2d at 340[6].

It would be impossible to find a more definitive statement of when jeopardy attaches in the context of a guilty plea. But, although this case was cited in the State's original brief (Res.Orig.Br. at 16), it was never mentioned or discussed in the Court of Appeals' opinion. Instead, the Court of Appeals chose to rely on "federal [case law] and other precedent," much of which does not even support the result the court reached. For instance, although the Court of Appeals cited LaFave, Israel & King,

Criminal Procedure, ' 25.1(d) at 642 (1999) for the proposition that jeopardy attaches "upon [the] unconditional acceptance of a guilty plea," that is not what the treatise actually says. Rather, it states that jeopardy attaches in the context of a guilty plea "when the court accepts the defendant's plea unconditionally *and enters the judgment of conviction.*" (Emphasis added.) LaFave, Israel & King, *Criminal Procedure*, *id.*

The omitted language is, of course, crucial, since a defendant in Missouri is not "convicted," and the court cannot enter a "judgment of conviction," until the defendant has been *sentenced* pursuant to that conviction. *See* ***State v. Lynch***, 679 S.W.2d 858, 859-862 (Mo. banc 1984). Thus, while a defendant may, of course, appeal from a criminal "conviction," he may not appeal from a guilty verdict where no sentence has been imposed. ***Lynch***, *id.*

In any event, even if jeopardy "attached" on the tampering charge when the trial judge unconditionally accepted his guilty plea for what the Court of Appeals found to be a lesser-included offense of stealing, that does not answer the question of whether the appellant's subsequent prosecution for the supposed "greater offense," *i.e.*, stealing in St. Louis County, violated the Double Jeopardy Clause.

Rather, the crucial, significant issue is whether the court's acceptance of the appellant's guilty plea to the

tampering charge, without imposing a sentence, constituted a "conviction" of tampering. If it did not, then the appellant's subsequent prosecution in St. Louis County raised no viable double-jeopardy claim.

The Double Jeopardy Clause affords a defendant three basic protections. ***Ohio v. Johnson***, 467 U.S. at 497-498, 104 S.Ct. at 2540[2]; ***Bally v. Kemna***, 65 F.3d 104, 106 (8th Cir. 1995). It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and it "`prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense.'" ***Bally v. Kemna***, *id.*, *quoting* ***Ohio v. Johnson***, *id.*

In the present case, of course, it is the third protection that is implicated by the appellant's double-jeopardy claim, "prosecution of a defendant for a greater offense [stealing] when he has already been . . . convicted on the lesser included offense [tampering]." But, of course, the appellant had not been "convicted" of the lesser-included offense, tampering, at the time he was "convicted" of, *i.e.*, found guilty of and sentenced for, the alleged greater offense, stealing.

In fact, the appellant was not sentenced upon (and therefore convicted of) tampering until March 31, 2000 (L.F. 58-61), more than four months later after he was

convicted of stealing. It was at that point, *i.e.*, at the time he appeared for sentencing on the tampering charge in the City of St. Louis, that the appellant's double-jeopardy claim ripened and should have been asserted. *See* ***Rost v. State***, 921 S.W.2d 629, 635[8] (Mo.App. S.D. 1996).

In ***Rost***, the defendant pleaded guilty in three separate cases to driving while intoxicated, leaving the scene of a motor vehicle accident, and assault in the second degree, in that order. He subsequently sought to vacate the first conviction imposed, driving while intoxicated, on the theory that his convictions of both driving while intoxicated and assault in the second degree, based upon the same act of driving, constituted double jeopardy. The court in ***Rost*** noted that, even if the defendant's double-jeopardy claim had merit, his conviction of driving while intoxicated, being the first conviction imposed, could not have subjected him to double jeopardy, because at the time it was imposed he had not been convicted of any other offenses. ***Rost***, 921 S.W.2d at 635[8].

Accordingly, then, if the defendant had a valid double-jeopardy claim to assert, it applied only to his subsequent conviction of assault in the second degree. ***Rost***, 921 S.W.2d at 635[9]. But, the court in ***Rost*** noted, the appellant's Rule 24.035 motion did not seek to vacate that sentence, and the time for filing such a motion

attacking his assault conviction had long since passed. ***Rost***, *id.* Consequently, the court held, Rost's double-jeopardy claim had been waived. ***Rost***, *id.*

Here, as in ***Rost***, if the appellant had a viable double-jeopardy claim to litigate, he should have attacked the *last* conviction imposed, *i.e.*, his sentence for tampering in the City of St. Louis. That means he should have raised his double-jeopardy claim in the Circuit Court of the City of St. Louis on March 31, 2000, when he appeared for sentencing, or at least in a Rule 24.035 action attacking that conviction and sentence.

As far as the record shows, the appellant never raised his double-jeopardy claim in the Circuit Court of the City of St. Louis, nor did he file a motion under Rule 24.035 seeking to set aside his tampering conviction. Instead, he mistakenly chose to attack his *first* conviction, entered in St. Louis County at a time when he had not been *convicted of* anything in the City of St. Louis.

In other words, the appellant has singled out the *wrong conviction* to attack on double-jeopardy grounds, even if his claim would otherwise have had merit, apparently because he received a seven-year sentence on the stealing charge, as opposed to a sentence of 173 days imprisonment on the tampering conviction (L.F. 57-62).

F. Waiver of Double-Jeopardy Claim by Guilty Plea

One more thing: The Court of Appeals should not even have *considered* the appellant's double-jeopardy claim, nor should this Court, for that matter, because the appellant's agreement to the plea bargain, and his acceptance of that bargain's benefits, absolutely preclude him from belatedly rasing such a claim for the first time in a Rule 24.035 proceeding.

As the Court of Appeals acknowledged in its opinion, a voluntary plea of guilty will waive most double-jeopardy claims. ***United States v. Broce***, 488 U.S. 563, 569, 109 S.Ct. 757, 762[2], 102 L.Ed.2d 927 (1989); ***Hagan v. State***, 836 S.W.2d 459, 461[3-6] (Mo. banc 1992). The only exception to this general rule, which is clearly inapplicable to the appellant's case, is when it is apparent from the face of the record that the court had no power to enter the conviction or impose the sentence. ***Broce***, 488 U.S. at 569, 109 S.Ct. at 762[1-2]; ***Hagan***, 836 S.W.2d at 461[3].

That exception does not and cannot apply to this case because the appellant was never sentenced on the tampering charge, *i.e.*, "convicted" of that offense, in the City of St. Louis until *after* sentence was imposed on the stealing case in St. Louis County. As previously emphasized, since the constitutional protection the appellant is attempting to invoke is the guarantee against the "prosecution of a defendant for a greater offense when he has already been .

. . *convicted* on the lesser included offense" (emphasis added), ***Ohio v. Johnson***, *id.*, the fact that the appellant had not been "convicted" of the tampering charge absolutely foreclosed the possibility that he would have any viable double-jeopardy defense to the stealing charge.

G. Effect of Plea Bargain on Appellant's Claim

Regardless, the fact that the appellant's guilty plea to the stealing charge was entered as part of a plea bargain, coupled with the fact that the appellant received the benefits of that bargain, provides still another reason the appellant should not be allowed to litigate this issue for the first time in a Rule 24.035 action.

In ***Broce***, the U.S. Supreme Court strongly and pointedly intimated that, in such a situation, a defendant might be precluded from raising a double-jeopardy claim where he receives a bargained-for disposition, even if the judge might otherwise not have had the "power to enter the conviction or impose the sentence." The Court, in concluding its opinion, stated:

> "We . . . need not consider the degree to which the decision by an accused to enter into a plea *bargain* which incorporates concessions by the Government, such as the one agreed to here, heightens the already substantial interest the Government has in the finality of the plea." (Court's emphasis.)

Broce, 488 U.S. at 576, 109 S.Ct. at 766[11].

Although ***Broce*** found it unnecessary to address this issue, there are numerous federal cases in which the courts have declined to consider a defendant's claims that his voluntary acceptance of a plea agreement subjected him to double jeopardy where, as here, the defendant has received

the benefits of the bargain. *See* ***Dermota v. United States***, 895 F.2d 1324, 1326 (11th Cir. 1990), *cert. denied*, 498 U.S. 837, 111 S.Ct. 107, 112 L.Ed.2d 78 (1990) ("plea agreement in exchange for which the government dismissed eight counts" waives double-jeopardy objection to consecutive sentences for crimes which "arose out the same transaction and constitute a single offense"); ***United States v. Allen***, 724 F.2d 1556, 1558[3] (11th Cir. 1984) (defendant could not assert defense of double jeopardy after entering pleas of guilty where, as a part of a plea bargain, he "received the benefit of the dismissal of . . . 13 charges" but then "wishe[d] to renege on his part of the bargain"); ***United States v. Pratt***, 657 F.2d 218, 221 (8th Cir. 1981) (to allow defendant to belatedly raise double-jeopardy defense would be "unjust" where there existed "additional charges which the [government] agreed to dismiss" in exchange for the guilty pleas); ***Herzog v. United States***, 644 F.2d 713, 716[6] (8th Cir. 1981), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3008, 69 L.Ed.2d 390 (1981) (defendant "chose not to challenge the indictment, but rather to negotiate for the dismissal of numerous counts in return for his pleas").

In the instant case, the appellant received the benefit of the plea agreement: current seven-year sentences on each of the four felony stealing counts to which he pleaded guilty. It seems reasonable to assume that if the

appellant had not agreed to plead guilty to all four charges, the State would have requested that at least one of the remaining three sentences run consecutively, resulting in an aggregate sentence of more than seven years.

A defendant, as well as the State, is bound by the terms of his plea bargain. ***State v. White***, 838 S.W.2d 140, 142[3] (Mo.App. W.D. 1992); ***Stokes v. State***, 671 S.W.2d 822, 824[2] (Mo.App. E.D. 1984); ***McIntosh v. State***, 627 S.W.2d 652, 655[5] (Mo.App. W.D. 1981); ***Brown v. State***, 607 S.W.2d 801, 804-805 (Mo.App. W.D. 1980). It is equally true that a defendant's collateral attack on his guilty plea will always be weakened where, as here, "the sentence was imposed pursuant to a plea bargain, and defendant avers no breach thereof." ***Row v. State***, 680 S.W.2d 418, 419[1-2] (Mo.App. S.D. 1984). *See also* ***Snyder v. State***, 854 S.W.2d 47, 49[4] n. 3 (Mo.App. S.D. 1993).

If this Court rules favorably on the appellant's belated double-jeopardy claim, the effect will be to unwittingly allow the appellant to refashion the plea agreement that he voluntarily entered into in November of 1999. The appellant, under the Court of Appeals' view of the law, would get to keep the concurrent seven-year aggregate sentence that he bargained for, but would not be held to his end of the bargain, guilty pleas to all four felonies.

This Court should take the step suggested by ***Broce*** and rule that where, as here, a defendant is aware of a potential double-jeopardy claim, yet elects to waive that claim in order to obtain a favorable plea agreement, and then obtains the benefits of his bargain, he cannot subsequently refashion the plea agreement to his liking by belatedly raising a double-jeopardy claim, even if the basis of that claim is apparent from the face of the record.

H. Summary of Argument

It has long been the law in Missouri that neither first- nor second-degree tampering is a lesser-included offense of stealing, even where an automobile is the property stolen. It also has been the law, at least since ***McIntyre*** was decided in 1988, that a defendant may be convicted of both stealing a motor vehicle and tampering with that vehicle, where, as here, the tampering occurs at a different time and in a different jurisdiction as the initial theft. The ***Davis*** case authorizes multiple convictions even where the stealing and the tampering occurred at essentially the same time.

Moreover, even assuming that ***McIntyre*** was incorrectly decided in 1988, that holding has since been ratified by the Missouri Legislature when in repeatedly re-enacting the stealing statute without making any amendments or

modifications that would have overruled or changed the ***McIntyre*** holding.

But even if ***McIntyre*** were to be overruled, or it could be said that a subsequent prosecution for stealing would be barred by a defendant's conviction of tampering with the same vehicle, such a legal principle would be of no aid to the appellant because, at the time he was convicted of stealing in St. Louis County, he had not been "convicted of" anything in the City of St. Louis. Assuming that he had a valid double-jeopardy argument that he could not be convicted of both stealing and tampering with the same vehicle, that claim should have been raised in the City of St. Louis, but apparently was not.

That is to say, the Court of Appeals' opinion overlooked the significance of the fact that the appellant was never sentenced on the tampering charge at the time he was convicted of stealing, so (1) jeopardy never attached to that charge; (2) whether jeopardy had "attached" at that point was irrelevant in any event, since the crucial question was whether the appellant had been "convicted" of that offense, and the mere acceptance of a guilty plea, without imposition of a sentence, does not constitute a "conviction"; and (3) since the appellant's plea to the tampering charge did not constitute a "conviction," that plea could not have affected affect the power of the judge in the St. Louis County case to accept the appellant's plea

in the stealing case, and therefore, under ***Broce***, he waived his double-jeopardy claim by not asserting it prior to pleading guilty.

Finally, since the appellant accepted the benefits of the plea agreement, he should, as ***Broce*** suggests, be estopped from belatedly asserting his double-jeopardy claim, regardless of its merits. Otherwise, he would be allowed to unilaterally reformulate the plea bargain in terms more favorable to him than he and the State had agreed to, without keeping his end of the bargain.

For all of these reasons, Point I of the appellant's brief is without merit and entitles him to no relief.

II.

THIS COURT HAS NO JURISDICTION TO CONSIDER THE APPELLANT'S SECOND POINT, WHICH ALLEGES THAT ' 545.010, RSMo 2000, AND RULE 23.10 PRECLUDED THE SENTENCING COURT FROM ACQUIRING JURISDICTION TO ACCEPT THE APPELLANT'S GUILTY PLEA TO THE STEALING CHARGE IN ST. LOUIS COUNTY BECAUSE HE PREVIOUSLY HAD BEEN CHARGED WITH THE "SAME OFFENSE" IN THE CITY OF ST. LOUIS, BECAUSE (1) THE TWO CRIMES WERE NOT THE "SAME OFFENSE" AND (2) BECAUSE, IN ANY EVENT, THIS ISSUE WAS NOT RAISED IN THE APPELLANT'S RULE 24.035 MOTION, NOR DID THE MOTION COURT ADDRESS THIS ISSUE IN HIS FINDINGS AND CONCLUSIONS.

In his second point on appeal, the appellant attempts to present an argument that was never raised in his Rule 24.035 motion: He claims that since he previously had been charged with what he calls the "same offense" in the City of St. Louis, under the provisions of ' 545.010, RSMo 2000, and Rule 23.10, the Circuit Court of St. Louis County had no jurisdiction to accept his guilty plea to the charge of felony stealing or sentence him pursuant to that plea, as long as the earlier charge remained pending in the City of St. Louis (App.Br. 20-25).

The appellant continues to assert, as he does under Point I of his substitute brief, that stealing an automobile and first-degree tampering constituted the "same offense." He then seeks to rely on ' 545.010 and Rule 23.10, both of which indicate that where a defendant is charged with the "same offense" in more than one county, the circuit court where the first charge is filed shall retain jurisdiction and control of the case to the exclusion of any other court so long as the charge shall remain pending and undisposed of. Rule 23.10 states, in pertinent part:

> If a criminal proceeding is commenced in a court having jurisdiction thereof, no other action for the same offense shall be commenced in another court so long as the criminal proceedings first commenced is pending.

The appellant asserts, for the first time on appeal, that, even aside from the issue of double jeopardy, ' 545.010 and Rule 23.10 prevented Judge Goldman from taking any action in connection with the pending stealing charge in St. Louis County as long as the tampering charge in the City of St. Louis remained pending (App.Br. 20-25).

The obvious answer to the appellant's arguments, certainly, is that, as demonstrated at length under Point I, *supra*, of the State's brief, the stealing and tampering charges did not constitute the "same offense," but rather were separate offenses that were committed at different times and in different jurisdictions. The appellant's theft of the 1999 Saturn in St. Louis County did not constitute a "continuing offense" that began when the appellant stole the car and continued indefinitely for as long as he decided to illegally retain it.

Regardless, the fact that this claim was not included in the appellant's amended motion precludes relief on this appeal. No rule is more well-settled in post-conviction cases than the principle that "'[c]laims not properly presented to the motion court cannot be reviewed on appeal, for "plain error" or otherwise.'" ***Milner v. State***, 975 S.W.2d 240, 243[3] (Mo.App. S.D. 1998), *quoting* ***State v. Kittrell***, 779 S.W.2d 652, 657[4] (Mo.App. S.D. 1989). In post-conviction proceedings, "any allegations or issues that are not raised in the [post-conviction] motion are waived on appeal."

State v. Clay, 975 S.W.2d 121, 141[77] (Mo. banc 1998), *cert. denied*, 525 U.S. 1085, 119 S.Ct. 834, 142 L.Ed.2d 690 (1999). *Accord:* ***Coates v. State***, 939 S.W.2d 912, 915[4] (Mo. banc 1997); ***Amrine v. State***, 785 S.W.2d 531, 535[8] (Mo. banc 1990); ***Grubbs v. State***, 760 SW.2d 115, 120[12] (Mo. banc 1988), *cert. denied*, 490 U.S. 1085, 109 S.Ct. 2111, 104 L.Ed.2d 672 (1989).

In ***Edwards v. State***, 954 S.W.2d 403, 408[6] (Mo.App. W.D. 1997), the Court of Appeals emphasized that "[u]nder Rule 24.035(d), the post-conviction motion must include all claims and *those not raised in the motion are waived*" (emphasis added). The court went on to state that "[b]ecause the appellate court lacks jurisdiction to consider these claims, they are not eligible for plain error review under Rule 84.13(c).'" ***Edwards***, *id.*, *quoting* ***State v. Dees***, 916 S.W.2d 287, 302-303[39] (Mo.App. W.D. 1995).

The phrase these cases invariably use is "lacks jurisdiction" or its equivalent. For example, in ***Mahlberg v. State***, 916 S.W.2d 858, 859 (Mo.App. E.D. 1996), the Court of Appeals emphasized that it "ha[d] *no jurisdiction* to review issues which were not before the motion court" (emphasis added), *citing* ***State v. Light***, 835 S.W.2d 933, 941[13] (Mo.App. E.D. 1992).

This principle, it should be emphasized, applies even where the appellant claims that the non-raised claim

involves a "jurisdictional" issue. For instance, in ***State v. McNeal***, 880 S.W.2d 325, 330[10] (Mo.App. E.D. 1994), the Court of Appeals held that it would not review the appellant's claim that the court lacked jurisdiction to enter a "corrected" judgment where he failed to raise this issue in his post-conviction motion. Similarly, in ***Hohenstreet v. State***, 784 S.W.2d 868, 870[2] (Mo.App. E.D. 1990), the movant asserted that the trial court lacked jurisdiction to accept his guilty plea because the amended information "charged a distinct and different offense from the original information." The Court of Appeals refused to entertain this claim, although of a jurisdictional nature, because it was not included in the appellant's Rule 24.035 motion. ***Hohenstreet***, *id.*

In ***Lute v. State***, 768 S.W.2d 166, 168[3] (Mo.App. W.D. 1989), a case brought under former Rule 27.26, the court declined to consider the appellant's claims "'that the trial court was without jurisdiction . . . because there was no information filed in Boone County.'" Since this issue was not raised in either the appellant's first or second motion under Rule 27.26, the court ruled that it was "not cognizable" on appeal. ***Lute***, 768 S.W.2d at 168[3].

In the instant case, although the appellant asserted under subsection 8a of his amended Rule 24.035 motion that the court in St. Louis County "lacked jurisdiction" to

convict him of stealing because he had previously been charged in St. Louis County with tampering, a supposed "lesser-included offense," that claim was based exclusively upon his constitutional rights "to due process of law, to fair and reliable sentencing, and to be free from double jeopardy" (L.F. 34). The appellant succinctly summarized his claim under subsection 8A of his motion as follows:

> Since Movant had already been charged in the City of St. Louis with a tampering charge, *his right to be free from double jeopardy* prohibited him from being charged in St. Louis with stealing the same automobile. McIntyre v. Caspari, 35 F.3d 338 (8th Cir. 1994).

(L.F. 35-36) (Emphasis added).

As this excerpt clearly indicates, the appellant's theory was under subsection 8A of his motion was that the St. Louis County charge constituted double jeopardy, not that it contravened ' 545.010 or Rule 23.10, and his citation to ***McIntyre v. Caspari***, 35 F.3d 338 (8th Cir. 1994), *cert. denied*, 514 U.S. 1077, 115 S.Ct. 1724, 131 L.Ed.2d 582 (1995), which was decided solely on double-jeopardy grounds, only serves to reinforce that conclusion.

"`A point raised on appeal after a denial of a postconviction motion can be considered only to the extent that the point was raised in the motion before the trial court.'" ***State v. Evans***, 992 S.W.2d 275, 295-296[53]

(Mo.App. S.D. 1999), *quoting* ***State v. Mullins***, 897 S.W.2d 229, 231[8] (Mo.App. S.D. 1995). Since the appellant's Rule 24.035 motion did not even mention ' 545.010 or Rule 23.10, much less rely on their provisions, the appellant's second point, regardless of its merits, cannot be considered because this Court does not have the jurisdiction to entertain it.

As earlier noted, neither the statute nor the rule apply to this case because the two offenses, felony stealing and tampering in the first degree, were *not* the "same offense." But regardless, the appellant's failure to include this claim in his Rule 24.035 motion precludes its consideration, under any standard of review.

Point II of the appellant's brief not only is without merit, but cannot even be considered by this Court.

III.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN SUMMARILY DENYING THE APPELLANT=S CLAIM THAT HIS PLEA ATTORNEY WAS INEFFECTIVE FOR FAILING TO MOVE TO DISMISS THE ST. LOUIS COUNTY STEALING CHARGE ON DOUBLE JEOPARDY GROUNDS, BECAUSE IT WAS WELL SETTLED AT THE TIME THE APPELLANT'S PLEA WAS ENTERED THAT SUCCESSIVE PROSECUTIONS FOR STEALING AN AUTOMOBILE AND TAMPERING WITH THE SAME VEHICLE DID NOT SUBJECT A DEFENDANT TO DOUBLE JEOPARDY, AND IT IS NOT INEFFECTIVE ASSISTANCE OF COUNSEL FOR AN ATTORNEY TO FAIL TO ANTICIPATE A CHANGE IN THE LAW.

Under Point III of the appellant's brief, he asserts that he was entitled to an evidentiary hearing in connection with his claim that his plea attorney was ineffective in failing to dismiss "the charge against him"--presumably the stealing charge--"because it violated his guarantee against double jeopardy" (App.Br. 26).

This point, obviously, has no merit for all of the reasons discussed under Point I of the State's brief: (1) Tampering in the first degree is not a lesser-included offense of stealing; (2) the appellant's convictions of tampering and stealing were based on separate acts and did not constitute the "same conduct" for double-jeopardy purposes; (3) the appellant was still awaiting sentencing and had not been "convicted" of tampering at the time he entered his guilty plea to, and was sentenced for, the stealing charge; and (4) the appellant waived any double-jeopardy defense he might otherwise have had to the stealing charge when he voluntarily agreed to the State's plea proposal and accepted the benefits of that agreement.

Obviously, a defendant's attorney cannot justifiably be accused of ineffectiveness for failing to raise a defense that is without merit. It is well settled that counsel cannot be deemed ineffective for failing to make a nonmeritorious objection, or for failing to file a motion that "would have been doomed to failure." ***Lawrence v. State***, 750 S.W.2d 505, 507[2] (Mo.App. E.D. 1988); ***Scott v. State***, 741 S.W.2d 692, 693[2] (Mo.App. W.D. 1987).

Even if this Court were to change the law, and rule that the appellant's double-jeopardy rights were infringed by the initiation of the stealing prosecution, the appellant cannot fault his attorney for failing to anticipate this change in the law. As noted under Point I, *supra*, of the State's substitute brief, at the time the appellant's plea to the stealing charge was entered, it was well settled that a conviction for stealing an automobile and a conviction for either first- or second-degree tampering involving the same vehicle did *not* constitute double jeopardy. ***State v. McIntyre***, 749 S.W.2d 420, 421-422[1] (Mo.App. E.D. 1988); ***State v. Davis***, 849 S.W.2d 34, 41-44[15] (Mo.App. W.D. 1993). Although the United States Court of Appeals for the Eighth Circuit, in ***McIntyre v. Caspari***, 35 F.3d 338 (8th Cir. 1994), *cert. denied*, 514 U.S. 1077, 115 S.Ct. 1724, 131 L.Ed.2d 582 (1995), reached a contrary conclusion, this ruling, although "meriting respect," was not binding on Missouri state courts. ***Futrell v. State***, 667 S.W.2d 404, 407[3] (Mo. banc 1984); ***State v. Cammon***, 959 S.W.2d 469, 473[7] (Mo.App. S.D. 1997).

The law in Missouri, at the time the appellant entered his guilty plea to the stealing charge, was governed by the state court decision in ***McIntyre*** and the subsequent holding in ***Davis***.

The effectiveness of counsel is measured by the circumstances and the state of the law in effect at the time of counsel's performance. ***Scott v. State***, 741 S.W.2d 692, 693[2] (Mo.App. W.D. 1987). It is not ineffective assistance of counsel to fail to anticipate changes in the law. ***State v. Parker***, 886 S.W.2d 908, 923[49] (Mo. banc 1994), *cert. denied*, 514 U.S. 1098, 115 S.Ct. 1827, 131 L.Ed.2d 748 (1995); ***Scott***, *id.*. It would indeed be a heavy burden an appellate court would impose if it were to require an attorney to anticipate what the law might be. ***Young v. State***, 770 S.W.2d 243, 244-245 (Mo. banc 1989); ***Laney v. State***, 783 S.W.2d 425, 427[1] (Mo.App. W.D. 1989). After all, defense counsel, to be effective, is not required to be clairvoyant. ***Young***, *id.* An attorney's advice must be measured against the backdrop of the law at the time of the guilty plea. ***Young***, 770 S.W.2d at 244[1]; ***O'Haren v. State***, 927 S.W.2d 447, 450[5] (Mo.App. W.D. 1996); ***Laney***, 783 S.W.2d at 427[1].

In this case, Missouri law in effect at the time of the appellant's guilty plea clearly indicated that convictions for both first-degree tampering and stealing, based upon the theft and subsequent tampering with the same automobile, was not double jeopardy. Even if the state court decision in ***McIntyre*** was incorrect when it was decided, it was the law in Missouri in November 16, 1999, when the appellant's guilty plea to the stealing charge was entered.

Consequently, even if this Court were to determine that ***McIntyre*** was incorrectly decided, and that the appellant would have had a valid-double jeopardy defense to the stealing charge if it had been timely asserted, the appellant's attorney was not ineffective in failing to anticipate such a holding, and the appellant, by accepting the State's plea offer and reaping the benefits of the plea bargain, knowingly and voluntarily waived any double-jeopardy defense he might otherwise have had.

Point III of the appellant's brief, then, is without merit and must be overruled.

IV.

THE MOTION COURT WAS NOT "CLEARLY ERRONEOUS" IN SUMMARILY DENYING THE APPELLANT=S CLAIM THAT HIS GUILTY PLEAS WERE BASED UPON COUNSEL'S ADVICE THAT PLEADING GUILTY IN EXCHANGE FOR CONCURRENT SENTENCES WOULD NOT AFFECT HIS CONDITIONAL RELEASE DATE "IN HIS FIRST CASE" OR "WOULD NOT AFFECT HIS DATE FOR EARLY RELEASE ON ALL THE CASES," BECAUSE SUCH ADVICE, IF GIVEN, WAS CORRECT, AND AN ATTORNEY CANNOT BE ACCUSED OF BEING INEFFECTIVE IN PROVIDING HIS CLIENT WITH CORRECT ADVICE. IN ANY EVENT, THE APPELLANT TESTIFIED AT THE GUILTY PLEA PROCEEDING THAT HIS PLEAS OF GUILTY TO THE FOUR CHARGES WERE BASED ON ANY PROMISES OTHER THAN THE ASSURANCE THAT HE WOULD RECEIVE FOUR CONCURRENT SEVEN-YEAR SENTENCES.

In his fourth and final point on appeal, the appellant alleges that the motion court was "clearly erroneous" in summarily rejecting his claim that his guilty pleas were based upon his plea attorney's advice that "if he pled guilty and received sentences concurrent to his earlier sentences, his date for earlier release would not be affected" (App.Br. 30). He claims that "[o]nce [he] arrived in the Department of Corrections, he learned that the later concurrent sentences delayed his opportunity for release" (App.Br. 30). He goes on to allege that if counsel "had not misinformed him, he would not have pled guilty but rather would have gone to trial" on all four charges (App.Br. 30).

It is clear, however, that the appellant was not entitled to an evidentiary hearing on this claim if only because he testified at the guilty plea proceeding that, aside from the promise of concurrent seven-year sentences in exchange for his

guilty pleas to the four counts of felony stealing, his pleas were not based upon anything anyone might have told him about what he would "receive *or anything else about any of the[ ] cases*" to which he was pleading guilty (emphasis added) (L.F. 9-10). Such a statement absolutely precludes him from now asserting that his pleas were based upon other promises his attorney might have made about his conditional release date.

Furthermore, depending upon how the appellant's confusing and contradictory claim is interpreted, it appeared that his attorney correctly advised him that his conditional release dates on each of the four sentences would not be adversely affected by receiving four concurrent sentences. This, obviously, was correct advice.

A. Standard of Review

Appellate review of the denial of a post-conviction motion under Rule 24.035 is limited to a determination of whether the findings of fact and conclusions of law issued by the hearing court are "clearly erroneous." ***Rousan v. State***, 48 S.W.3d 576, 581[2] (Mo. banc 2001); ***Morrow v. State***, 21 S.W.3d 819, 822[1] (Mo. banc 2000); Rule 24.035(k). Findings and conclusions are "clearly erroneous" only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***Rousan***, *id.*; ***Morrow***, 21 S.W.3d at 822[2];

Appellate review of the motion court's denial of post-conviction relief is not a *de novo* review. ***State v. Gilpin***, 954 S.W.2d 570, 575[1] (Mo.App. W.D. 1997). Rather, in reviewing a motion court's ruling, its findings and conclusions are deemed to be presumptively correct. ***Wilson v. State***, 813 S.W.2d 833, 835[5] (Mo. banc 1991); ***Shackleford v. State***, 51 S.W.3d 125, 127[1] (Mo.App.

W.D. 2001). The party contesting the correctness of the findings bears the burden of showing them to be "clearly erroneous." ***Lestourgeon v. State***, 837 S.W.2d 588, 590[2] (Mo.App. W.D. 1992).

To be entitled to an evidentiary hearing, the movant (1) must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters must have resulted in prejudice to the movant. ***Morrow***, 21 S.W.3d at 822-823[4]; ***Hall v. State***, 16 S.W.3d 582, 585[2] (Mo. banc 2000). No evidentiary hearing is required if the files and records of the case conclusively show that the movant is not entitled to relief. ***Morrow***, 21 S.W.3d at 822[3]; ***State v. Jones***, 979 S.W.2d 171, 180[16] (Mo. banc 1998); Rule 24.035(h).

B. Legal Analysis

Unquestionably, guilty pleas must be made knowingly and voluntarily with sufficient awareness of the relevant circumstances and likely consequences. ***State v. Roll***, 942 S.W.2d 370, 375[13] (Mo. banc 1997); ***Wilson v. State***, 26 S.W.3d 191, 195[2] (Mo.App. W.D. 2000); ***Johnson v. State***, 921 S.W.2d 48, 50[3] (Mo.App. W.D. 1996). If the accused has been misled or induced to plead guilty by fraud, mistake, misapprehension, fear, coercion, or unkept promises, the defendant should be permitted to withdraw his plea. ***Wilson***, 26 S.W.3d at 195[3].

Likewise, it is undisputed that a defendant is entitled to the effectiveness of counsel in connection with the entry of his guilty pleas. ***Hill v. Lockhart***, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370[3], 88 L.Ed.2d 203 (1985). However, in cases where a plea of guilty has been entered, the adequacy of the defendant's counsel is immaterial unless it prevents the plea from being

entered voluntarily and with an understanding of the charges. ***Roll***, 942 S.W.2d at 375[9]; ***Hagan v. State***, 836 S.W.2d 459, 463[13] (Mo. banc 1992); ***Wilkins v. State***, 802 S.W.2d 491, 497[2] (Mo. banc 1991), *cert. denied*, 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 98 (1991).

When a defendant attempts to raise a claim of ineffectiveness of counsel in connection with the entry of his guilty plea, he must allege and prove that counsel's representation fell below an objective standard of reasonableness, and that he was prejudiced by his attorney's mistakes, *i.e.*, that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. ***Hill v. Lockhart***, *id.*; ***Roll***, 942 S.W.2d at 374-375[8]; ***Hagan***, 836 S.W.2d at 463-464[14].

In order for a defendant to succeed on a claim that he involuntarily pleaded guilty because his plea counsel misled him, the mistaken belief must be reasonable. ***Shackleford***, 51 S.W.3d at 129[11-12]; ***Krider v. State***, 44 S.W.3d 850, 857[10] (Mo.App. W.D. 2001); ***Wilson***, 26 S.W.3d at 195[4]. There must, in other words, be some "reasonable basis" for him to believe the alleged misrepresentation by counsel." ***Shackleford***, *id.* A defendant's mistaken belief will vitiate his guilty plea only if it results from a positive representation upon which he is entitled to rely. Shackleford, 51 S.W.3d at 129[12]; ***Krider***, 44 S.W.3d at 857[11]; ***Johnson***, 921 S.W.2d at 50[4].

As earlier noted, in his brief the appellant argues that his guilty pleas were involuntary because his plea attorney misled him by "informing him that, if he pled guilty and received sentences concurrent to his earlier sentences, his date for earlier release would not be affected" (App.Br. 30).

However, after he arrived in the Department of Corrections, "he learned that the later concurrent sentences delayed his opportunity for release" (App.Br. 30).

It is not clear from this allegation exactly what he means by the assertion that "the later concurrent sentences delayed his opportunity for release" (App.Br. 30). Nor does his Rule 24.035 motion shed much light on this claim. In his Rule 24.035 motion, his initial allegation was that "counsel was ineffective for telling [him] that receiving concurrent time in two later cases would not affect his conditional release dates from the Missouri Department of Corrections *in his first case*" (emphasis added) (L.F. 45).

Subsequently, however, the appellant asserted that after he was charged in the two 1999 stealing cases, "counsel informed him that receiving sentences that ran concurrent with his earlier [1998 case] would not affect his date for early release *on all his cases*" (emphasis added) (App.Br. 45-46).

In the appellant's brief, he does not mention this discrepancy, much less attempt to explain it. But regardless of how the appellant's claim is interpreted, one thing is clear: The concurrent nature of the appellant's sentences obviously had no impact, positive or negative, on the appellant's "early release date" on *any* of those sentences. The appellant cites no legal authority that would indicate otherwise, and the State is aware of no such authority.

It would appear, then, that counsel's alleged advice that the appellant's acceptance of the plea bargain would not adversely affect his "early release dates" on each of the stealing charges was perfectly correct. "`Ineffectiveness of counsel cannot result from the giving of correct advice.'"

Brown v. State, 485 S.W.2d 424, 428[2] (Mo. 1972), *quoting* ***Tucker v. State***, 482 S.W.2d 454, 456[2] (Mo. 1972).

The motion court, in its findings and conclusions, had a different interpretation of the appellant's allegations. The motion court believed that what the appellant was raising was the claim that "his attorney led him to believe that his jail time credit in 98CR-5413"--the case involving the stolen vehicle--"would apply to the other two St. Louis County sentences" (L.F. 64). This interpretation apparently was based upon a statement in the appellant's Rule 24.035 motion that after arriving at the Missouri Department of Corrections, the appellant "learned that his jail time credit to which he was entitled on the 98CR case did not apply to the 99CR cases, and his later conditional release date would control" (L.F. 47).

But, obviously, each of the four stealing sentences had its own "conditional release date" that would be determined by (1) the length of that sentence (seven years in each case) and (2) the amount of jail time accumulated on, and attributable to, each individual sentence. Assuming, as the motion court did, that the appellant was alleging that his plea attorney had informed him that he would be entitled to jail-time credit on offenses to which it clearly did not apply, the appellant's reliance upon such a statement would have been completely and inherently unreasonable.

As earlier noted, in order for a defendant to succeed on a claim that he involuntarily pleaded guilty because his plea counsel misled him, the mistaken belief must be *reasonable*. ***Shackleford***, 51 S.W.3d at 129[11-12]; ***Krider***, 44 S.W.3d at 857[10]; ***Wilson***, 26 S.W.3d at 195[4]. Certainly, it would have been completely unreasonable for the appellant to have believed

that he would be awarded jail-time credit that he had not earned, and the motion court expressly entered a finding to that effect (L.F. 64).

In addition, although the appellant's motion contained the conclusory allegation that he would not have pleaded guilty except for counsel's "erroneous" advice on this issue (L.F. 64), he did not explain why counsel's supposed advice on this issue had such an impact on his decision to accept the plea agreement. In ***Hill v. Lockhart***, the defendant challenged the validity of his guilty pleas because his attorney allegedly had misadvised him that he would be eligible for parole after he had finished serving one-third of his sentence. ***Hill***, 474 U.S. at 54-55, 106 S.Ct. at 368. In fact, he was classified under Arkansas law as a "second offender" and was required to serve one-half of his sentence before becoming eligible for parole. ***Hill***, 474 U.S. at 55, 106 S.Ct. at 368.

Nevertheless, the U.S. Supreme Court held that the defendant was not entitled to an evidentiary hearing in connection with this issue. ***Hill***, 474 U.S. at 60, 106 S.Ct. at 371[4-5]. Among other things, the court observed that Hill did not allege any "special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." ***Hill***, 474 U.S. at 60, 106 S.Ct. at 371[4]. The court also correctly noted that any mistaken belief that Hill might have had regarding the amount of time he would have to serve before becoming eligible for parole, also would have affected "his calculation of the time he likely would serve if he went to trial and were convicted." ***Hill***, *id.*

The same is true in the present case. The appellant's Rule 24.035 motion did not plead any "special circumstances" that would support the claim

that the appellant placed particular emphasis on counsel's advice regarding the jail-time credit issue. Furthermore, even if the appellant had requested a jury trial on each of the four stealing counts, he still would not be entitled to jail-time credit on offenses to which it did not apply. Consequently, it is impossible to imagine how his decision to accept the State's plea offer could have been affected by the jail-time credit question.

Regardless, as the motion court also noted (L.F. 65), at the time the appellant's guilty pleas were entered, he was expressly asked if his decision to plead guilty was based on any promises or expectations *other than* the bargained-for seven-year concurrent sentences (L.F. 9-10). Judge Goldman asked the appellant, "Has anyone made any promises to you about what you'd receive *or anything else about your case or any of these cases other than what we've talked about here today?*" (emphasis added) and the appellant answered, "No sir" (L.F. 10).

The appellant's sworn statement, then, conclusively refuted his subsequent claim that his guilty pleas were based upon attorney's assurances that he would receive jail-time credit on offenses to which it did not apply (assuming that this, in fact, was the intended meaning of the appellant's claim).

The motion court properly denied the appellant relief in connection with this allegation. Point IV of his brief is without merit and must be denied.

CONCLUSION

For the reasons presented under Points I through IV, *supra*, of the State's substitute brief, the motion court's summary denial of the appellant's motion under Rule 24.035, was not "clearly erroneous," Rule 24.035(k), and should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

PHILIP M. KOPPE
Assistant Attorney General

Mo. Bar No. 23369

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, MO 64111
(816) 889-5019
(816) 889-5006 FAX

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03, and (b) complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 15,010 words, excluding the cover, this certification, the signature block and the appendices, as determined by WordPerfect 6.1 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached substitute brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 23rd day of April, 2002, to:

Mr. Douglas R. Hoff
Assistant Public Defender
1221 Locust Street
St. Louis, MO 63103

_____
Philip M. Koppe